SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITIONER'S BRIEF IN SUPPORT OF HIS PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT O FTHE STATE OF WISCONSIN.

Preliminary Statements.

In this brief we confine ourselves to the issues of "due process of law" and the right of "trial by jury."

This Court places a liberal construction on its requirements for a review of records and decisions of state courts.

Edwards v. *Elliott*, 88 U. S. (21 Wall.) 532;
Chicago, Burlington &c. R'd v. *Chicago*, 166 U. S. 226.

POINT I.

The right of trial by jury in actions at law, such as the case at bar, is a right of paramount importance and value.

We quote from *Hodges* v. *Easton*, 106 U. S. (XVI Otto), at 408, at p. 412, as follows:

> "It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."

We quote from *Capital Traction Company* v. *Hof*, 174 U. S. 1, at p. 6, as follows:

> "II. The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.' 1 Journals of Congress, 28.
>
> "The Ordinance of 1787 declared that the inhabitants of the Northwest Territory should 'always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury,' 'and of judicial proceedings according to the course of the common law.' 1 Charters and Constitutions, 431."

One of the causes for the Declaration of Independence was denial of the right of "Trial by Jury". *Wisconsin Annotations* (1914), p. 1767.

We quote from *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226, at p. 243, as follows:

> "One of the objections made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it, facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law."

We quote from *Plimpton* v. *Town of Somerset,* 33 Vermont (4 Shaw) 283, at p. 290, as follows:

> "The language of our first constitution, and which has ever since been retained, that trial by jury '*ought to be held sacred,*' shows vividly the strong attachment of the people of this State to this mode of trial, and their implicit belief that it is essential to the honest and enlightened administration of justice. At the time of the adoption of the Federal and State constitutions, this feeling was a very strong one with the American people."

We quote from *Turnpike Company* v. *Parks et al.,* 50 Ohio State Reports 568, at p. 578, as follows:

> "The section in the present constitution preserving inviolate the right of trial by jury, is found in the constitution of 1802, and in the same words. It is a guarantee of the continuance of a right recognized in the Great Charter, and substantially embodied in the constitutional *compact* of every state, as the great safeguard of life, liberty and property." (Italics supplied.)

The Ohio Supreme Court here probably had in mind the *compact* of the Ordinance of 1787 for the Government of the Northwest Territory out of which Ohio, like Wisconsin, was carved.

Point II.

Petitioner has been deprived of his property without due process of law by a denial to him, by Wisconsin Courts, of a trial by jury in the libel case at bar in violation of Section 1 of Article XIV of the Amendments to the Federal Constitution.

We quote from this Section 1 as follows:

> "* * *; nor shall any State deprive any person of life, liberty, or property, without due process of; * * *." Wisconsin Statutes, 1939, p. 29.

The *reputation* of the petitioner of which he was deprived by a denial of due process of law by a denial of trial by jury as pointed out herein *is property.*

We quote from *Odgers on Libel and Slander* (sixth edition) by W. Blake Odgers and R. Ritson, as follows:

> "If in any given case the words employed by the defendant have appreciably injured the plaintiff's reputation, the plaintiff has suffered an injury which is actionable without proof of any other damage. Just as any invasion of a man's property is actionable without proof of any pecuniary loss, so is any actual disparagement of his good name. '*His reputation is his property,* and, if possible, more valuable than other property' (*per* Malins, V-C., in *Dixon* v. *Holden* (1869), L. R. 7 Eq., at p. 492). 'Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter' (*per* Best, C. J., in *De Crespigny* v. *Wellesley* (1829), 5 Bing., at p. 406). Often, too, a man's livelihood depends on his reputation. Whenever, therefore, the words are such that they will necessarily injure the reputation of the plaintiff, they are defamatory on the face of them, and actionable *per se.*" (Italics not in parentheses are ours.)

We quote from *Turnpike Company* v. *Parks et al.,* 50 Ohio State Reports 568, at p. 576, as follows:

> "The term property, as said in *Caro* v. *Metropolitan Elevated Railroad Co.,* Superior Court of N. Y., Gen'l. Term, January, 1880, 19 Am. L. Reg. N. S., 384, is of the largest import, and embraces every mode in which it may be applied to public use, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments. It is an elementary principle that 'property consists in the free use, enjoyment and disposal of all one's acquisitions without any control or diminution, save by the laws of the land.' 1 Black. Comm., 138."

See *Walker* v. *Sauvinet*, 92 U. S. 90, wherein a claim, and a judgment, for $1,000 against the proprietor of a public coffee-house for a discrimination against a colored person by excluding him from such public coffee-house in violation of a statute, was treated as *property*.

It is well settled that the right of trial by jury in actions at law, and other cases, in State courts, is in the realm or sphere of "due process of law" as guaranteed by Section 1, Article XIV, of the Amendments to the Federal Constitution and is referable to such guarantee; and that, if a State provides for the right of trial by jury in actions at law, or other cases, as a part of its "settled course of judicial proceedings", and adheres to such right of trial by jury as a part of such "proceedings", in its organic law, Constitution, statutes, or otherwise, a denial of such right of trial by jury in actions at law, or other cases, in such State is a denial of "due process of law" as guaranteed by this Section 1, Article XIV. An extensive search therefor has failed to discover any adequate authority or precedents for a contrary view. There is a wealth of authority or precedents, expressly or by implications, in support of this view.

Bank of Hamilton v. *Dudley's lessee*, 27 U. S. (2 Pet.) 492;
Webster v. *Reid*, 52 U. S. (11 How.) 437;
Walker v. *Sauvinet*, 92 U. S. 90;
Kennard v. *Louisiana ex rel. Morgan*, 92 U. S. 480;
Hallinger v. *Davis*, 146 U. S. 314;
Meeker & Co. v. *Lehigh Valley R. R.*, 236 U. S. 412, 430;
Southern Ry. Co. v. *Eichler*, 56 F. (2d) 1010, 1013;
Porter v. *Mitchell*, 4 Alaska 327, 332;
Turnpike Co. v. *Parks et al.*, 50 Ohio State Reports, 568, 578;
Webb, Auditor, & Co. v. *Baird*, 6 Ind. 13;
Plimpton v. *Town of Somerset*, 33 Vermont 283, 288;
Colon v. *Lisk*, 47 N. E. (N. Y.) 302, 303;

Guthrie Nat. Bank v. *McElhiney*, 47 Pacific (Okl.) 1062, 1063;

Turner Creamery Co. v. *Chicago, M., St. P. Ry Co.*, 154 N. W. (S. D.) 819, 824-825;

Reed v. *Wright*, 2 Iowa (Greene's Rep's) 15;

Dale v. *Marvin*, 148 Pac. (Ore.) 1116, 1118.

We quote from the *Walker* case, at pp. 92-93, as follows:

> "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. *This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Murray's Lessee* v. *Hoboken L. & I. Co.*, 18 How. 280. *Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State.* Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the Constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States." (Italics are ours in the citation of authority.)

This *Walker* case is cited, reviewed, approved and quoted from, for the most part as herein quoted from, in *Hallinger* v. *Davis*, 146 U. S. 314, 320.

We quote from the *Kennard* case, at p. 481, as follows:

> "The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the statute of Jan. 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done '*in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.*' We accept this as a suf-

cient definition of the term '*due process of law*,' for the purposes of the present case." (Italics ours.)

We quote from the *Porter* case, at p. 332, as follows:

"'*Due process of law*' *carries with it the right of trial by jury, when trial by jury has been the usual course of administration in the particular class of actions, through courts of justice, to which the one in question belongs.* What was at the time of the adoption of the Constitution of the United States the usual course of administration of courts of justice was grafted into that Constitution under the name of '*process of law, or trial,*' *and carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through the courts of justice at the time the Constitution was adopted.*" (Italics ours.)

We quote from the *Turnpike Company* case, at p. 579, as follows:

"The determination of the issues in the probate court being properly within the domain of a jury; and as the result of the court's finding the road to have been out of repair for the preceding six months was, that the franchise of the company to take toll was adjudged under the statute to have been extinguished, it may well be asked, whether the company was not, in contravention of the constitution of the State and of the United States, thereby deprived of its property '*without due course of law,*' *or its equivalent,* '*due process of law,*' *when denied the privilege of a jury trial.*" (Italics ours.)

* * * "It would be very difficult to frame a definition of the term '*due course of law,*' *or* '*due process of law,*' which would be accurate, complete and appropriate under all circumstances. But it is very obvious that every thing which takes the form of an enactment is not therefore to be deemed the law of the land, or due course or process of law. If this were so, then decrees and forfeitures in all possible forms, and acts confiscating the

property of one person or class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use, would be the law of the land."

From the foregoing cases and quotations from some of them it is well settled that "due course of law" means "due process of law"; that "due process of law" means "process of law, or trial," and "in the due course of legal proceedings" or "according to the settled course of judicial proceedings"; that due process of law is process according to "the law of the land"; that "This process in the States is regulated by the law of the State"; that "the law of the State" means "the law of the land" in the State; that the words "due process of law", as thus defined, comprehend or embrace trials of cases as a part of such "proceedings", including trials by juries; and that the requirement of "due process of law" of this Section 1, Article XIV, *"is met if the trial is had according to the settled course of judicial proceedings" of "the State"*. This requirement cannot be met in any other way.

It is likewise well settled that "the settled course of judicial proceedings", "due process of law," in Wisconsin requires that the petitioner in the case at bar, an action at law, should not be denied a "trial by jury".

The *Wisconsin Constitution* provides as follows:

"ARTICLE I.

Declaration of Rights.

* * * * * * *

Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. * * *

* * * * * * *

Trial by jury; verdict in civil cases. Section 5. *The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy;* but a jury trial may be waived by the parties in all cases in the manner prescribed by law. * * *

* * * * * * *

Remedy for wrongs. Section 9. Every person is entitled to a certain remedy in the laws *for all injuries,* or *wrongs which he may receive in his person, property, or character; he ought to obtain justice* * * * *completely and without denial,* * * * *conformably to the laws.*

* * * * * * *

Maintenance of free government. Section 22. The blessings of a free government can only be maintained by a firm adherence to justice, * * *, *and by frequent recurrence to fundamental principles.*

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ARTICLE XIV.

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Common law continued in force. Section 13. Such parts of the *common law* as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." (Italics ours.)

Wisconsin Statutes, 1919, pp. 34, 35, 37, 59.

We quote from the *Wisconsin Statutes*, 1939, as follows:

"270.07. Issues, by whom tried, when tried. (1) An issue of fact in an action for the recovery of *money only,* * * * *must be tried by a jury* except as otherwise provided in this chapter and except that equitable defenses or counter-claims are triable by the court. * * *

270.32. Jury trial, how waived. Trial by jury may be waived by the several parties to an issue of fact by failing to appear at the trial, or by written consent filed with the clerk; or by consent in open court, entered in the minutes." (Italics ours.)

Wisconsin Statutes, 1939, pp. 2589, 2596.

At *common law*, all issues of fact, in actions at law, were required to be tried before and decided by a jury.

The Sarah Hazard, Claimant, 21 U. S. (8 Wheat.) 391;

The Bank of Hamilton v. *Dudley's lessee*, 27 U. S. (2 Pet.) 492;

Whitehead v. *Shatluck*, 138 U. S. 146;

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 377;

Evans v. *Lehigh Coal & Navigation Co.*, 205 Fed. 637, 638;

Webb, Auditor & C. v. *Baird*, 6 Indiana 13;

Turnpike Company v. *Parks et al.*, 50 Ohio State Reports 568, 578;

Plimpton v. *Town of Somerset*, 33 Vermont 283, 291;

Hewitt v. *Duncan's Estate*, 43 S. W. (2d) 87, 89 (Mo.).

The right of trial by jury was recognized and granted in Magna Charta June 15, 1215. It was incorporated in the *compact* contained in The Ordinance of 1787 entered into on July 13, 1787, for the government of the Northwest Territory, out of which the State of Wisconsin was subsequently carved. The right of trial by jury was made secure to the people of the Territory of Michigan, of which Wisconsin was at one time a part; and it was likewise made secure to the people of the Territory of Wisconsin when it was created out of the Territory of Michigan. *Wisconsin Annotations* (1914) pp. 1757, 1788-1791; 1799, 1807-1810.

In view of all of this, and taking into consideration the definitions of "due process of law" set forth above and

the provisions of the *Wisconsin Constitution and Statutes* set forth herein, "trial by jury" in actions at law, such as the case at bar, is guaranteed to the petitioner under the guarantee of "due process of law" contained in Section 1, Article XIV, of the Amendments to the Federal Constitution.

POINT III.

The denial of the right of trial by jury to petitioner by the Wisconsin courts, in the case at bar, is in violation of the "COMPACT" of July 13, 1787, contained in the ordinance for the Government of the Territory of the United States Northwest of the Ohio River (Ordinance of 1787), out of which Wisconsin and four other States were carved.

We quote from this *Ordinance* as follows:

> "It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of *compact* between *the original states*, and *the people and states in the said territory*, and *forever remain unalterable*, unless by *common consent*, to wit:
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> * * * * * * *
>
> "Art. 2d. The inhabitants of the said territory, shall *always* be entitled to the benefits of * * * *the trial by jury*, * * *." (Italics ours.) *Wisconsin Annotations* (1914) at p. 1790.

We are aware that the State of Wisconsin was "admitted into the Union on an equal footing with the original States, in all respects whatever". 9 *United States Statutes at Large* 178. There is, however, nothing in this language of the statutes just quoted which contains the consent of the people of Wisconsin, Territory or State, to a change in the *compact* of the Ordinance of 1787 giving them the right of "trial by jury" *forever* without such consent. A search has failed to disclose that the people of Wiscon-

sin ever gave their consent to such change in the *compact*. On the contrary the Wisconsin Constitution and Statutes, heretofore set forth, establish that they never did give their consent to such change. We have not overlooked *Hawkins* v. *Bleakly, Auditor of the State of Iowa, et al.*, 243 U. S. 210, where there is dicta to the contrary on the above "equal footing" language. This like other workmens' compensation statutes, is distinguishable from the case at bar.

The term *compact* is a very binding term and it cannot be treated lightly. A *compact* is fully as binding, if not more so, as a contract or a covenant.

We are not here concerned with the right of Wisconsin to impair or otherwise violate the terms of this *compact*, or contract, or covenant, because Wisconsin has never attempted to do so. On the other hand Wisconsin has adhered to the *compact* rigidly.

The legislative branch of a Government of a Territory governed by the Ordinance of 1787 lacked power to prohibit *"trial by jury"* of matters of fact in actions at law.

Webster v. *Reid*, 52 U. S. (11 How.) 437;

Reed v. *Wright*, 2 Iowa (Greene's Rep's) 15.

After the admission of a State into the Union from the Northwest Territory, the Supreme Court or other courts of such State could not deny to a litigant before it the right of "trial by jury" in an action at law.

The Bank of Hamilton v. *Dudley's Lessee*, 27 U. S. (2 Pet.) 492;

Webster v. *Reid*, 52 U. S. (11 How.) 437;

Turnpike Company v. *Parks, et al.*, 50 Ohio State Reports 568, 578;

See Milwaukee v. *State*, 193 Wis. 423, 440.

Petitioner stands upon his rights, under this *compact* of the Ordinance of 1787, in the case at bar.

Point IV.

There is a conflict between the decision of the Wisconsin Supreme Court in the case at bar and decisions of this Court and of other State courts of last resort, including some from States governed by the Ordinance of 1787 and carved out of the Northwest Territory.

There is a conflict between the decisions of the Supreme Court of Wisconsin and the Circuit Court of Milwaukee County in the case at bar (*Hoan* v. *Journal Co.*, 238 Wis. 311; 208 N. W. 228), on the one side, in so far as they have held or decided that a denial of a "trial by jury" is not a denial of "due process of law," and decisions of this Court and of other State courts of last resort, including some carved out of the Northwest Territory on the other side, which hold to the contrary. These contrary decisions of such other State courts of last resort are as follows:

Bank of Hamilton v. *Dudley's Lessee*, 27 U. S. (2 Pet.) 492;
Webb, Auditor & C. v. *Baird*, 6 Ind. 13;
Reed v. *Wright*, 2 Iowa (Greene's Rept's) 15;
Turnpike Company v. *Parks et al.*, 50 Ohio State Reports, 568, 578;
Plimpton v. *Town of Somerset*, 33 Vermont 283, 288.

We urge that this conflict of decisions between State courts is, standing alone, an adequate ground for the granting of certiorari by this Court in the case at bar, especially in view of the fact that there is a conflict between States governed by the above set forth *Compact* of the *Ordinance of 1787*.

POINT V.

The last clause of the Seventh Amendment to the Federal Constitution applies to cases tried before a jury in a State court, equally with those tried before a jury in a Federal court, and it is applicable to the case at bar in all respects.

The Justices v. *Murray*, 76 U. S. 274;
Chicago, Burlington &c. R'd v. *Chicago*, 166 U. S. 226, 242;
Capital Traction Company v. *Hof*, 174 U. S. 1, 13;
Slocum v. *New Work Life Ins. Co.*, 228 U. S. 364, 379.

This last clause of this Seventh Amendment to the Federal Constitution is as follows:

> "* * * and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

We quote from this *Chicago* case, commencing at p. 242, as follows:

> "It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. *It applies equally to a case tried before a jury in a State court* and brought here by writ of error from the highest court of the State." (Italics ours.)

We quote from this *Slocum* case, at p. 379, as follows:

> "In *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: 'It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either

party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, *when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.*' " (Italics ours.)

The limitations upon and the method of re-examining the facts tried by the jury in the case at bar according to the rules of the common law, as provided for in the last clause of this Seventh Amendment, are fully pointed out in the above language of the *Slocum* case set forth in *italics;* and there is no other method thus provided.

The nullification of the jury's verdict in the case at bar should not be permitted to stand in view of the provisions of the last clause of this Seventh Amendment.

To the extent, if any, that *Treat Manufacturing Company* v. *Standard Steel and Iron Company,* 157 U. S. 674, which appears on p. 20 of Respondent's brief, holds that a trial judge in a Federal court may arbitrarily dispense with the verdict of a jury by directing a verdict, or otherwise, the precedent established by that case has been, in effect, impaired, if not nullified, by the later decisions of this Court cited above to Point III and by *Berry* v. *United States,* 312 U. S. 450 and *Conway* v. *O'Brien,* 312 U. S. 492.

Point VI.

The courts of Wisconsin proceeded erroneously in the case at bar PRECISELY as if this case were not an action at law but a suit in a court of equity where "a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment".

See *Whitehead* v. *Shatluck*, 138 U. S. 146, from which we quote, at p. 151, as follows:

> "The Seventh Amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment. *Lewis* v. *Cocks*, 23 Wall. 466, 470; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 573; *Buzard* v. *Houston*, 119 U. S. 347, 351. And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' *Hipp* v. *Babin*, 19 How. 271, 278."

The Wisconsin courts thus proceeded contrary to the applicable provisions of the Wisconsin Constitution and Statutes, herein elsewhere set forth, securing to the petitioner the right of *"trial by jury"* according to *"the law of the land"* which means *"the law of the State"*, which means *"trial"* *"according to the settled course of judicial proceedings"* of *"the State"*, which means *"due process of law"* or its equivalent *"due course of law"*, as herein elsewhere more fully pointed out.

Point VII.

If there is any credible evidence to sustain a finding of fact made by a jury, in an action at law, the verdict of the jury must be permitted to stand.

This is the law of the United States and of the State of Wisconsin.

The Sarah Hazard, Claimant, 21 U. S. (8 Wheat.) 391;
Chicago, Burlington &c. R'd v. *Chicago,* 166 U. S. 226, 242;
The Justices v. *Murray,* 76 U. S. 274;
Capital Traction Company v. *Hof,* 174 U. S. 1, 13;
Slocum v. *New York Life Ins. Co.,* 228 U. S. 364, 379;
Berry v. *United States,* 312 U. S. 450;
Conway v. *O'Brien,* 312 U. S. 492;
Millard v. *North River Ins. Co.,* 201 Wis. 69, 71;
Trantmam v. *Charles Schefft & Sons Co.,* 201 Wis. 113, 115, 116;
Walter v. *Four Wheel Drive Auto Co.,* 213 Wis. 559, 562, 563;
Borg v. *Downing,* 221 Wis. 463, 465;
Gumm v. *Koefle,* 227 Wis. 635, 637;
Jensen v. *Jensen,* 228 Wis. 77, 80;
Rieschl v. *Wisconsin Michigan Power Co.,* 236 Wis. 116.

We quote from the *Berry* case, at p. 456, as follows:

> "There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough."

We quote from the *Gumm* case, at p. 638, as follows:

> "It has been held *over and over again* that the question for determination in such situations is whether there is any credible evidence which in any reasonable

view fairly admits of an inference that supports the jury's findings. If there is such evidence trial courts are not justified in changing the answer." (Italics ours.)

Point VIII.

Petitioner has not had a "Trial by Jury" in the case at bar.

Petitioner is in the same position today as he would be in if no jury were ever drawn to hear the evidence in the case at bar and to render its verdict. It was a waste of time for the jurors to be present at the trial. They served no useful purpose as jurors. Everything they did was nullified by the action of the Circuit Court of Milwaukee County, which was affirmed by the Supreme Court of Wisconsin. We say this with all due respect to the members of both of those courts. Two of the answers of the jury to questions in the special verdict were completely changed by the substitution of wholly opposite answers; and these Wisconsin courts have rendered a judgment against petitioner and in favor of respondents just as if no answers were ever made by the jury to the other ten questions in the special verdict. All of this was done notwithstanding that there was credible evidence in the record which, if believed by the jury, was adequate to sustain each and all of their answers to the questions in the special verdict, as elsewhere pointed out more fully herein.

We quote from *Chicago, Burlington &c. R'D* v. *Chicago*, 166 U. S. 226, commencing at page 234, as follows:

> "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, *and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.* This court, referring

to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' *Davidson* v. *New Orleans,* 96 U. S. 97, 102." (Italics ours.)

What is said here about the legislative branch of a State government applies equally to the judicial branch.

We quote from *Plimpton* v. *Town of Somerset,* 33 Vermont 283,, at p. 290, as follows:

> "Some have been led by their experience and reflection to doubt the value of jury trials, at least in certain classes of cases, and have, therefore, inclined to construe with less strictness this provision of the constitution. We think, however, that *it should be construed in the spirit with which it was enacted,* and that any restriction of its present application should come, not through legislation and judicial construction, but from the direct, constitutional and considerate action of the people.
>
> "The general rule of construction in reference to this provision of the constitution is, that any act which destroys or materially impairs *the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury,* is unconstitutional." (Italics ours.)

We urge that the *compact* of the Ordinance of 1787, heretofore quoted, providing for the "right of trial by jury" should be given the broad construction which is called for by its language and spirit.

We quote from Respondent's Brief Opposing Grant of Writ, at page 20, as follows:

> "The petitioner has had a trial by jury although it is clear that no right secured to him by the Fourteenth

Amendment would have been infringed if he had not had a trial by jury.

Walker v. *Sauvinet*, 92 U. S. 90."

With all due respect to the very learned counsel for respondents, this contention is not supported by the facts, the record or the law, including the law of this *Walker* case, heretofore more fully pointed out.

Conclusion.

WHEREFORE Petitioner respectfully and earnestly urges that this Court rescind its determination or order made on November 10, 1941, denying his Petition for a writ of certiorari; and this Petitioner prays that the Petition for such writ of certiorari be reconsidered and that this Court issue such writ to the Supreme Court of Wisconsin to review its proceedings and decision, in the case at bar.

Respectfully submitted,

STEPHEN J. MCMAHON,
Of Counsel.

FRANCIS E. MCGOVERN,
Counsel for Petitioner.

Certificate of Counsel.

The undersigned petitioner and counsel for the petitioner, Daniel W. Hoan, above named, in the above entitled cause, hereby certify that the above and foregoing Petition for a rehearing is made, presented and filed in good faith and not for the purpose of delay; and it is believed by such counsel to be meritorious.

DANIEL W. HOAN,
Petitioner.

STEPHEN J. MCMAHON,
Of Counsel.

FRANCIS E. MCGOVERN,
Counsel for Petitioner.